SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969.

No. 992.

NEW YORK FEED CO., INC., and STEPHEN HELLER,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

No. 998.

MILKY WAY PRODUCTIONS, INC., JAMES BUCKLEY and AL GOLDSTEIN,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

Supplemental Brief of Appellants, Milky Way Productions, Inc., *et al.*, and New York Feed Co., Inc., *et al.*, Pursuant to Rule 24(5).

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1970

(3587)

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On February 23, 1970, there came to the attention of appellants' counsel, and on February 25, 1970, appellants' counsel obtained a copy of a decision of February 12, 1970, entitled *Robert Krahm, et al., v. Milton Graham, et al.*, ___ F. Supp. ___ (D. Ariz. No. Civ. 69-392 Phx. WEC Feb. 12, 1970) (Walter E. Craig, J.).

Plaintiffs in that case were the owners and employees of bookstores in the City of Phoenix. Defendants were the former Mayor, the Chief of Police and the City Prosecutor. The court permanently enjoined the defendants:

1. "from the further prosecution of any pending criminal actions instituted pursuant to A.R.S. Section 13-532 against these plaintiffs which were not preceded by an adversary judicial hearing on the question of obscenity."

2. "from the institution of any future criminal actions under A.R.S. Section 13-532 against these plaintiffs in the absence of a prior adversary judicial hearing on the question of obscenity."

Insofar as this decision is not yet reported, appellants here quote the entire portion of the opinion dealing with prior adversary hearing starting with page 4 of the unreported opinion to the end:

Prior Adversary Hearing.

"What must the defendants do to insure the adequate protection of plaintiffs' First Amendment rights?

> 'Because the line between protected and unprotected speech, under the First Amendment, is so difficult to draw, and because First Amendment rights are of such fundamental importance to our system of government, the Constitution requires a procedure "designed to focus searchingly on the question of obscenity" before speech can be regulated or suppressed. *Marcus v. Search Warrants*, 367 U. S. 717, 732, 81 S. Ct. 1708, 1716, 6 L. Ed. 2d 1127.' *Cambist Films, Inc., v. Tribell*, 293 F. Supp. 407.

In order to focus on the question of obscenity without encroaching on constitutionally protected expression, the states must employ 'sensitive tools' which will 'em-

body the most rigorous procedural safeguards.' *Bantam Books, Inc., v. Sullivan*, 372 U. S. 60, 66, 83 S. Ct. 631, 637. In this area of procedure the Supreme Court has frequently held that seizures of allegedly obscene material without an independent determination of obscenity by a judicial officer or a prior adversary hearing are unconstitutional. *Marcus v. Search Warrants, supra*; *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205, 211, 84 S. Ct. 1723, 12 L. Ed. 2d 809; *Lee Art Theatre v. Virginia*, 392 U. S. 636, 88 S. Ct. 2103.

The procedure of requiring a prior adversary hearing has recently been extended by federal district courts to cases where, 'even in the absence of seizure, threats of criminal prosecution by police officers or other administrative officials can constitute an all too effective prior restraint.' *Poulos v. Rucker*, 288 F. Supp. 305, 310. See also *Delta Book Distributors, Inc., v. Cronvich*, 304 F. Supp. 662; *Sokolic v. Ryan*, 304 F. Supp. 213.[2] This recent trend would appear to be entirely consistent with the Supreme Court's earlier opinion in *Bantam Books, Inc., v. Sullivan, supra.*

Delta Book Distributors, Inc., v. Cronvich, supra, pointed out the illogic of trying to distinguish between cases where actual seizure and arrest have occurred and those where only that 'threat' of such action is involved. In either case a prior restraint upon the exercise of First Amendment rights can be effectively exerted. The threat of pending criminal prosecutions is no different. 'The idea that a criminal prosecution and threats or probability of further prosecutions does not chill one's First

[2]In *Sokolic, supra*, Judge Lawrence by supplemental order withdrew his adoption of *Delta, supra*, when the same issue was decided to the contrary by his brethren in the Middle District of Georgia. *Carter, et al., v. Gautier, et al.*, F. Supp. . No reason other than the existence of the contrary result was given for the change of position.

Amendment rights is judicial illusion.' *Sokolic, supra,* at 215. It would be illogical to contend that the multitude of pending prosecutions in the case at hand had no chilling effect.

This Court is in agreement with the principle adopted in *Delta, supra,* that '"[t]he dissemination of a particular work, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing. [Citations omitted.]"' At page 667 (quoting from *Cambist Films, supra*). Such a procedure should provide for immunizing alleged violators from criminal liability prior to an adversary judicial determination of the fact of obscenity. *Delta, supra.*

It is essential that the difficult determination as to what is obscene should not be made by law enforcement officers. 'It suggests no disrespect for competent police officers to insist that in this sensitive area decisions be made according to a more rigorous standard employed by more expertly trained hands.' *Poulos v. Rucker, supra,* at 309.

Defendants argue that the chilling effect of a prior adversary hearing is as great as a criminal prosecution. The Court is aware that even a prior adversary hearing imposes some chill on potentially protected activities. All prior restraint cannot be avoided. *Delta, supra,* at 667. This Court doubts that the inhibition created by the prior adversary hearing is more than a modicum of the burden imposed by a criminal proceeding at which both the obscenity *vel non* of the questioned material and criminal liability are determined simultaneously.

Defendants further argue that the nature of the material involved, that is, many separate titles together with a very short shelf life, necessarily means that by the

time an adversary determination of the fact of obscenity is made there will be nothing left against which to take action. This understates the flexibility of an adversary hearing and misunderstands the preferred position of First Amendment rights. The Court is aware that, except for the superficial titles, most of the publications involved in this case are virtually indistinguishable. There is no reason why a single adversary hearing may not entertain many different titles of essentially the same textual material.

In view of the decision reached herein, this Court expresses no opinion on the applicability of *Redrup v. New York*, 386 U. S. 767, 87 S. Ct. 1414, to Arizona's obscenity statute. Nor does this Court express an opinion as to whether defendants have adduced sufficient evidence of plaintiffs' 'Scienter' to achieve a proper conviction under the obscenity statute. The Court finds no reason at the present time to redress any alleged attempts on the part of defendants to influence judicial and public opinion against plaintiffs.

IT IS ORDERED, ADJUDGED AND DECREED that defendants be permanently enjoined from the further prosecution of any pending criminal actions instituted pursuant to A.R.S. Section 13-532 against these plaintiffs which were not preceded by an adversary judicial hearing on the question of obscenity.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants be permanently enjoined from the institution of any future criminal actions under A.R.S. Section 13-532 against these plaintiffs in the absence of a prior adversary judicial hearing on the question of obscenity.

Dated this 12th day of February, 1970."

With reference to the district court's opinion and decision quoted above, appellants note:

1. The district court's determination and conclusion did *not* turn on any demonstration that prosecutions were undertaken in bad faith.

2. The district court's opinion correctly pointed out, as appellants' jurisdictional statement pointed out, that the inhibition created by prior adversary hearing does not begin to equal the suppressive effects of fully matured criminal actions at law, and at the same time prior adversary determination with its flexibility would not result in hobbling obscenity law enforcement.

This supplemental brief will be printed.

The motions of appellees should be denied, and the Court should hear plenary argument.

February 26, 1970.

Respectfully submitted.

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